

UNION PACIFIC RAILROAD CO.

IBLA 88-133

Decided May 30, 1990

Appeal from a decision of the Area Manager, Kemmerer Resource Area, Wyoming, Bureau of Land Management, increasing annual rental charges for communication site right-of-way. WYW-7514.

Affirmed.

1. Appraisals--Communication Sites--Rights-of-Way: Act of March 4, 1911--Rights-of-Way: Appraisals

A BLM increase in the annual rental charge for a communication site right-of-way is properly affirmed where the holder of the right-of-way fails to establish by a preponderance of the evidence that the appraisal upon which the increase is based incorrectly determined the fair market rental value of the right-of-way by the comparable lease method of appraisal.

APPEARANCES: M. H. Ahern, General Director, Communications Facilities, Union Pacific Railroad Company, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

The Union Pacific Railroad Company (Union Pacific) has appealed from a decision of the Area Manager, Kemmerer Resource Area (Wyoming), Bureau of Land Management (BLM), dated November 25, 1987, increasing the annual rental rate for its communication site right-of-way, WYW-7514, from \$600 to \$1,200.

Effective November 3, 1967, BLM granted to Union Pacific a 50-year right-of-way for a microwave repeater station and access road to be located on 5.92 acres of land situated in the E½ SW¼ sec. 24, T. 16 N., R. 120 W., sixth principal meridian, Uinta County, Wyoming, on top of Medicine Butte. The right-of-way was issued pursuant to the Act of March 4, 1911, as amended, 43 U.S.C. § 961 (1970) (repealed effective Oct. 21, 1976, by section 706(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), P.L. 94-579, 90 Stat. 2793 (1976)). The right-of-way was designed to encompass an approximately 1-acre site (208.7 by 208.7 feet) containing a communications building and tower, as well as the access road. By letter dated August 27, 1969, BLM accepted Union Pacific's partial amendment and relinquishment of the right-of-way in order to account for a relocation of the access road from that depicted in Union Pacific's right-of-way application.

Immediately prior to the reappraisal, Union Pacific paid annual rental charges in the amount of \$600 for the site. The last rental payment in that amount was received by BLM on November 3, 1986, covering the 1-year period ending on November 2, 1987. On September 7, 1987, BLM reappraised the subject right-of-way according to a "Communication Facility Schedule" which is embodied in a report entitled the "Wyoming Appraisal Report" (Appraisal Report) prepared by a BLM appraiser. ^{1/} By memorandum dated October 14, 1987, the Chief, Branch of Appraisal, Wyoming State Office, relying on that report, notified the Area Manager that the reappraised annual rental of the subject right-of-way should be \$1,200.

In the November 1987 decision, BLM increased the annual rental rate for the subject right-of-way from \$600 to \$1,200 in accordance with the Appraisal Report. BLM also provided therein for a change in the billing period so that it would end on December 31, rather than November 2, of each year, citing 43 CFR 2803.1-2(a). That change meant that the initial rental period under the new rate would encompass 14 months (Nov. 3, 1987, through Dec. 31, 1988). Accordingly, BLM required Union Pacific to pay total rental charges in the amount of \$1,400. Union Pacific (appellant) appealed.

On October 21, 1988, almost 1 year after the November 1987 decision, BLM informed appellant that it had prematurely afforded appellant the right to appeal to the Board in 1987. BLM indicated that, because appellant's right-of-way had been granted pursuant to the Act of March 4, 1911, appellant had the right to request a hearing pursuant to 43 CFR 2802.1-7(c) (1979):

If you would like to have a hearing on this case, we will request [the Board] to return the case and we will conduct the hearing. If you do not agree with the decision resulting from the hearing, you may appeal it to [the Board]. If you would like to waive your rights of a hearing, please submit a letter stating that fact. We will then forward your letter to [the Board] to be included in the casefile.

To date, BLM has not requested return of the casefile to conduct a hearing, and we have not received any letter in which appellant waives its right to a hearing.

BLM is normally required to provide the holder of a right-of-way issued prior to FLPMA, the right to request a hearing prior to issuing an

^{1/} The casefile, as originally forwarded to the Board, inexplicably did not contain this appraisal report, on which the reappraised value of the subject right-of-way was ultimately based. Accordingly, because of the vital nature of the report in terms of deciding this appeal and in order to ensure that Union Pacific had an opportunity to address any aspect of the report, the Board requested that the report be submitted to the Board and that a copy be served on Union Pacific. BLM did so. Union Pacific has filed no additional statement of reasons for its appeal.

appealable decision establishing the rental rate for the subject right-of-way. See U.S. Steel Corp., 71 IBLA 88, 90 (1983); American Telephone & Telegraph Co., 57 IBLA 215, 218 (1981). Such right can then be exercised or waived by the right-of-way holder. See Pacific Bell, 104 IBLA 66, 67-68 (1988). Here, however, BLM failed to notify appellant of its right to request a hearing until after issuing an appealable decision.

While this did not accord with proper procedure, nothing would be served now by remanding the case to BLM so that it may first offer appellant the right to request a hearing. BLM has already indicated its willingness to provide a hearing, and appellant has not requested one. We construe appellant's failure to request a hearing as a waiver of its right to one. The Board will not dismiss an appeal as interlocutory where no useful pur-*pose* will be served by remanding the case. Beard Oil Co., 97 IBLA 66, 68 (1987); Robert C. LeFaivre, 95 IBLA 26 (1986). We turn, therefore, to the merits of appellant's challenge to the reappraised annual rental.

In its statement of reasons, appellant primarily requests that it be "grandfathered" from the rental increase, since it had "incurred a significant burden of financial outlays to the benefit of the many other site users." Appellant explains that it "literally pioneered the development of the Medicine Butte site, by not only selecting the location, but also by constructing access roads, and providing an electrical power line to the mountain site," which facilities now serve approximately 20 different companies. 2/ Appellant has not submitted its own appraisal of the subject right-of-way, nor has it indicated what annual rental charge should be used by BLM.

The annual rental charge for the subject right-of-way was taken from the Appraisal Report, which determined the annual rental charge for a "typical" communication site right-of-way on various mountain tops located in the Rawlins and Rock Springs BLM Districts in southwestern Wyoming, including Medicine Butte. 3/ BLM compared the subject right-of-way to 13 comparable private leases for communications purposes in that area (Appraisal Report at 5). BLM focused on the most recent leases because these leases reflected rental charges negotiated by lessors who recognized the value of their land for such multiple uses. Id. at 3. The annual rental charges for these 13 leases, which were issued between August 1974 and December 1984, ranged from \$1,000 to \$2,400.

BLM expressly excluded two private leases issued for the location of FM radio transmitters because the annual rental charges for these leases indicated that different rental charges applied to this type of use. Id. at 4. BLM also evidently excluded two more private leases issued by Union Pacific Land Resources, Inc., because that lessor, in determining rental

2/ In the Appraisal Report, at page 2, BLM states that Medicine Butte was covered by 26 communications facilities in October 1986.

3/ BLM described the "typical" communication site right-of-way as having established "commercial power, access, phone service, 360 [degree] electronic utility, and renewal rights" (Appraisal Report at 5).

charges, relied on private leases issued by the Rock Springs Grazing Association, which were already represented amongst the leases. See Appraisal Report at 5. Eliminating these leases rendered the range in annual rental charges from \$1,000 to \$1,800. 4/

Of the remaining private leases, BLM selected four leases which were considered representative of the different elements characteristic of communication site leases, i.e., size of the site, availability of utilities, whether first or secondary use, whether new or renewed lease, whether lessee has renewal rights, and the cost of access. The annual rental charges for three of these four leases was \$1,200; the fourth was \$1,465. BLM then considered the impact of these different elements on the value of the leases for rental purposes in order to determine whether it was necessary to make an adjustment to the rental value of the private leases so as to make them comparable to the typical communication site right-of-way. BLM concluded, however, that no adjustment needed to be made in the case of size, availability of utilities, first or secondary use, and new or renewed lease because these factors had no discernible effect on value. In the case of renewal rights, BLM stated that no adjustment was necessary because both the private leases and BLM rights-of-way had such rights. Finally, BLM noted that, of the four leases, only one levied a one-time charge for providing access. Annualizing this charge over the life of the lease, BLM determined that it had an annual value of \$265, thus reducing the annual rental charge for that lease to \$1,200 (Appraisal Report at 6).

Accordingly, BLM concluded that the "lease rent for all four leases was \$1,200.00 per year." BLM further concluded that the "annual rent for th[e] typical [communication] site [right-of-way] would be \$1,200.00." Id. at 6. That is the rental rate adopted by the Area Manager with respect to the subject right-of-way.

[1] BLM is required to compute rental charges for the subject right-of-way according to the fair market rental value of that right-of-way, as determined by appraisal. See Mountain States Telephone & Telegraph Co., 107 IBLA 82, 85-86 (1989). Such value is considered the amount "for which in all probability the right to use the site would be granted by a knowledgeable owner willing but not obligated to grant to a knowledgeable user

4/ BLM stated that the "majority of these sites was at \$1,200.00 per year" (Appraisal Report at 7), explaining:

"This figure was due to two major causes. One was the fact that Rock Springs Grazing Association is currently charging \$1,200.00 per year for any new or renewed leases and ha[s] been charging this amount for the last two years. The other reason is the impact that MCI Telecommunications had when they came across the state in 1983 and offered all landowners \$1,200.00 per site per year. Due to the effect of escalator clause[s] in some [of] the older leases being exercised, there are some leases in excess of \$1,200.00 per year. However, the number of these leases is minimal compared to those at \$1,200.00 per site and under." Id.

who desires but is not obligated to so use." American Telephone & Telegraph Co., 25 IBLA 341, 349-50 (1976).

We have recently been wary of appraisals of BLM communication site rights-of-way which relied on a master appraisal determining the fair market rental value of a "typical" BLM right-of-way. Our concern has stemmed from the fact that the appraisals involved merely the application of a pre-determined value for a typical BLM right-of-way derived from an evaluation of the rentals charged for supposedly comparable private leases with no effort made to decide whether the right-of-way subject to appraisal actually conforms to the typical right-of-way. See Joyce Communications, Inc., 111 IBLA 255, 258 (1989). In general, we concluded that this type of appraisal does not comport with the comparable lease method of appraisal, which is the preferred method for determining the fair market rental value of nonlinear rights-of-way. As we said in Joyce Communications, that method "involves a comparison of the right-of-way to be appraised with similar private leases, adjusting for any differences determinative of rental value between them." Id.

In Mountain States and Joyce, the data relied upon by BLM in defining the typical site exhibited a broad range in annual rental charges amongst the private leases, and there was no analysis demonstrating how the typical site related to those private leases in order to discern how BLM determined where the typical right-of-way fell within that range. ^{5/} See Mountain States Telephone & Telegraph Co., supra at 87. Where the range in annual rental charges is wide, the concept of a typical site is of doubtful relevance. High Country Communications, Inc., 105 IBLA 14, 17 (1988).

In the present case, the range in annual rental charges amongst the private leases is not that great. Moreover, BLM has shown how the typical BLM right-of-way compared to private leases selected for comparison, and has identified and described the various factors considered potentially determinative of rental value. By doing so, BLM properly determined that the typical BLM right-of-way fell at a certain point of the range of rental charges for the private lease transactions.

We do not imply by our acceptance of the technique of comparing a communication site right-of-way site to a typical site that a party may not challenge an assessment of rental by attacking the comparability of its site to any of the factors identified by BLM as significant, viz., "commercial power, access, phone service, 360 [degree] electronic utility, and renewal rights" (Appraisal Report at 5). Thus, for example, if a right-of-way holder could demonstrate that its access is appreciably worse than that of the typical site, it may be able to successfully attack an assessment of

^{5/} In Mountain States, the range in rental charges reviewed by BLM in connection with its master appraisal was \$300 to \$19,600 in the case of private leases issued for common carrier microwave relay use. 107 IBLA at 87. In Joyce, the range was \$200 to \$5,800 in the case of private leases issued for CATV receiver and radio-TV translator use. 111 IBLA at 257.

rental equal to the rental ascribed to the typical site. A right-of-way holder could presumably so demonstrate by showing that its access is worse than that of the specific leases relied on by BLM in establishing the "typical" site. However, appellant has not done so here. 6/

At a minimum, the case record must demonstrate that BLM related the typical BLM right-of-way to the subject right-of-way. While this would not constitute a direct comparison of the subject right-of-way with the private leases, the subject right-of-way should match the typical BLM right-of-way with respect to all factors determinative of rental value, in order to bring the appraisal within the ambit of the comparable lease method of appraisal.

It has been impossible in other cases to determine how (or even if) BLM related the particular BLM right-of-way subject to appraisal to the typical BLM right-of-way addressed in the master appraisal. 7/ In con-trast, we are satisfied here that BLM has provided an adequate, if some-what dated, background for its determination that appellant's site and the typical site are comparable, so that it is possible to determine whether the subject right-of-way fits within the profile of the typical right-of-way, and so that appellant could have challenged its factual basis. 8/

BLM has defined the typical BLM right-of-way as characterized by established "commercial power, access, phone service, 360 [degree] electronic utility and renewal rights" (Appraisal Report at 5). The subject right-of-way is, likewise, characterized by having established power and access. The subject right-of-way lacks phone service. However, there is no evidence that the presence of phone service has any effect on fair market rental value. With respect to 360-degree electronic utility, the May 2, 1980, BLM Appraisal Report states, at page 9, that, although the subject right-of-way has about a 300-degree electronic utility, the "majority of the market lies in the useable direction." Thus, in this respect, the right-of-way is functionally equivalent to a typical BLM right-of-way having 360-degree electronic utility. Finally, there is no evidence that the subject right-of-way

6/ Appellant could have done so here, since (as discussed below) BLM included specific site information about the leases used to develop its typical site.

7/ As we said in High Country Communications, Inc., supra at 17, "we find no evidence that the appraiser considered the characteristics of appellant's [communication] site to determine whether it fits within the profile of the 'typical' site on which the [reappraised] rental is based." 8/ We note that it was necessary to refer to an earlier BLM appraisal, dated May 2, 1980, for specific details about the subject site. Since appellant has not challenged the factual basis of BLM's decision, we accept this description of the site. However, in the future, BLM would be well advised to ensure that its case record contains adequate contemporary information to allow a comparison of the subject site to its typical site.

is distinguished from the typical BLM right-of-way appraised by BLM in connection with the Appraisal Report in any other respect which would be determinative of rental value. Rather, the record demonstrates that the subject right-of-way matches the typical BLM right-of-way in all relevant aspects.

We have also rejected use of the master appraisal analysis where the record lacked sufficient information for the Board or the appellant to verify the comparability between the private leases with either the typical BLM right-of-way or the particular BLM right-of-way subject to appraisal. See Joyce Communications, Inc., supra at 258. Of particular importance was the failure to identify the location of the private lease transactions and the parties involved. See Mountain States Telephone & Telegraph Co., supra at 89. Attached to the Appraisal Report, however, are "Electronic Site Lease Data Sheet[s]" which describe each of the lease transactions used by BLM in determining the appropriate annual rental charge for the subject right-of-way, identifying the location of the transactions and the parties involved. Thus, we regard the present record, in this respect, as complete.

For these reasons, we conclude that the present case represents a proper application by BLM of the comparable lease method of appraisal.

Appellant's only objection to the reappraised annual rental charge for the subject right-of-way is that it is in some way entitled to avoid the increase in that charge because of its original expenditures to bring power and access to Medicine Butte. ^{9/} Appellant has failed to demonstrate that the rental value of any of the comparable private leases relied upon by BLM was determined by whether the lessee was responsible for developing the site in terms of power and access. The record indicates that the opposite is the case. Thus, the Appraisal Report, at page 6, states that private leases have the same annual rental charges regardless of whether or not they were leased to first users, *i.e.*, those who "ha[d] to bear all the costs of bring[ing] power and roads to a site." ^{10/} No consideration whatever should be given to matters not affecting market value. American Telephone & Telegraph Co., 25 IBLA at 350. Since appellant has not shown that this factor is determinative of rental value, we conclude that it properly has no bearing on the determination of the fair market rental value of the subject right-of-way.

^{9/} The record somewhat undercuts appellant's assertion that it "pioneered" development of Medicine Butte for communication site use. The May 2, 1980, BLM appraisal report with respect to the subject right-of-way states, at page 8, that development and use of the butte for communications purposes was begun in 1960 by the Sweetwater Television Company, which developed physical access and installed a power line to its communication site (W-091848).

^{10/} We are not surprised that private lessors do not discount the rental they charge companies for the location of communications facilities on their land in order to allow for the expenditures made to develop the land.

Appellant has failed to otherwise demonstrate by a preponderance of the evidence that BLM improperly applied the comparable lease method of appraisal or that the rental charge adopted was in excess of the fair market rental value of the subject right-of-way. In these circumstances, we will uphold BLM's appraisal. See Pacific Bell, supra at 70; Big Sky Communications, Inc., 110 IBLA 213, 214 (1989). Therefore, we conclude that the Area Manager properly increased the annual rental charge for appellant's right-of-way from \$600 to \$1,200.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

David L. Hughes
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge